

PRESENTATION ON PRACTICE BEFORE THE TENTH CIRCUIT BANKRUPTCY APPELLATE PANEL

ALBUQUERQUE, NEW MEXICO
JUNE 12, 2006

Opening Comments - Judge Cornish, Eastern District of Oklahoma

INTRODUCTION OF PANEL AND OVERVIEW OF PRESENTATION; INVITATION FOR QUESTIONS

Judge Tom R. Cornish, Bankruptcy Judge, Eastern District of Oklahoma

Judge Robert E. Nugent, Bankruptcy Judge, District of Kansas

Judge William T. Thurman, Bankruptcy Judge, District of Utah

Barb Schermerhorn, BAP Clerk of Court

OVERVIEW AND STRUCTURE OF BAP - Judge Nugent

- Statutory Authority, 28 U.S.C. § 158(b)(1)
- Four other Circuits with BAPs: First, Sixth, Eighth, and Ninth
- Tenth Circuit Judicial Council Resolution, March 8, 1999
- Judges appointed by Circuit CJ; all judges on regular, active service eligible;
- Nine judges - terms of service: 5 year (CJ 3 year), staggered, renewable terms;
- BAP judges may not hear appeal originating in their own district;
- BAP CJ oversees administrative duties
- Composition of Panels
 - Motions panels

- Merits panel
- Use of *pro tem* judges

CLERK'S OFFICE - Barb Schermerhorn

- All pleadings and communication to Tenth Circuit Denver Courthouse
- Docketing clerks and legal staff
- Resources: BAP Website (bap10.uscourts.gov)
- BAP Guide: Appeals Overview and Quick Reference
- Indexes of Filed Decisions

DIRECT APPEALS TO TENTH CIRCUIT UNDER BAPCPA - Judge Thurman

Direct appeals to Circuit are now allowed under certain circumstances. 28 U.S.C. § 158(d)(2); 10th Circuit BAP Procedural Memo 05-01 (Oct. 11, 2005).

STARTING THE APPEAL PROCESS - Judge Cornish

- Notice of Appeal; FRBP 8002:
 - Ten-day appeal period starts with entry of order appealed, not signing. [Three-day mailing rule does not apply. FRBP 9006(a)]
 - Post-judgment motions: If within ten days of entry of the judgment, order or decree, a party files a motion (1) to amend or make additional findings of fact under FRBP 7052, (2) to alter or amend the judgment under FRBP 9023, (3) for a new trial under FRBP 9023, or (4) for relief under FRBP 9024, then the ten days for filing an appeal runs from the entry of the order disposing of the last such motion outstanding. FRBP 8002(b).
 - Premature notice of appeal: A notice of appeal filed after the announcement of a decision but before entry of the judgment or order is treated as filed after such entry and on the day thereof. FRBP 8002(a). It is appellant's responsibility to perfect the appeal by ensuring an order is entered.
 - Extension of time to file NOA:

- Motions to extend the time for filing a notice of appeal are brought before the bankruptcy judge, who may extend a party's time for filing a notice of appeal for 20 additional days or 10 days from the date of entry of the order granting the motion, whichever is later. FRBP 8002(c). A request for an extension of time must ordinarily be filed before the time for filing a notice of appeal has expired. Id. However, such motion may be filed no later than 20 days after the expiration of the appeal period based upon a showing of "excusable neglect."
- Extensions of time to file a notice of appeal are governed by FRBP 8002, not FRBP 9006. In re Rambo, 209 B.R. 527 (10th Cir. BAP), *aff'd without opinion*, 132 F.3d 43 (10th Cir. 1997).
- Failure to comply with the deadline to file a notice of appeal due to the press of other business is not excusable neglect. Lang v. Lang (In re Lang), 305 B.R. 905 (10th Cir. BAP 2004), *aff'd*, 414 F.3d 1191 (10th Cir. 2005). Neither is failure to read or understand the rules. United States v. Torres, 372 F.3d 1159 (10th Cir. 2004).
- NOA is filed in the bankruptcy court with \$255 fee; BAP docketing and filing fee is \$455. BAP courts cannot grant IFP status. In re Jeys, 202 B.R. 153 (10 Cir. BAP 1996).
- Timely filing of a notice of appeal is "mandatory and jurisdictional." Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978); In re Rambo, 209 B.R. 527 (10th Cir. BAP), *aff'd without opinion*, 132 F.3d 43 (10th Cir. 1997) (also, the filing date of a notice of appeal is the date that it is received by the clerk of court, not the date that it is mailed).

RULINGS THAT ARE APPEALABLE - Judge Nugent

- Separate Document Rule: FRBP 9021 requires that the order/judgment appealed must be entered on a separate document.
- What is a "final" order?
 - The BAP has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. Miller v. Miller (In re Miller), 284 B.R. 734,

735-36 (10th Cir. BAP 2002); 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

- A decision is considered final if "it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). An order disposing of an objection to a claim is a final order for purposes of 28 U.S.C. § 158(a)(1). See In re Geneva Steel Co., 260 B.R. 517, 520 (10th Cir. BAP 2001) (citing In re Garner, 246 B.R. 617, 619 (9th Cir. BAP 2000)), *aff'd*, 281 F.3d 1173 (10th Cir.2002).
- Similarly, an order fixing the priority of a creditor's claim is a final order for appeal purposes. See In re Geneva Steel Co., 260 B.R. 517, 520 (10th Cir. BAP 2001) (citing In re Kids Creek Partners, L.P., 200 F.3d 1070, 1074 (7th Cir.2000)).
- Orders that dispose of fewer than all claims or parties:
 - A motion for leave to appeal from an interlocutory order is filed pursuant to FRBP 8003. The motion should be filed in the bankruptcy court at the time the notice of appeal is filed. If filed after a BAP case number has been assigned, the motion should be filed at the BAP.
 - An order that disposes of fewer than all causes of action or parties will not be considered final absent such express determination. The appellant can also seek certification from the bankruptcy judge under FRCP 54(b), made applicable by FRBP 7054 and 9021 (through FRCP 58). If the bankruptcy court makes an "express determination that there is no just reason for delay" in entry of a final judgment on a particular matter, the court can then make an "express direction" for the entry of final judgment on part of an action and the matter is then final for purposes of appeal.
- Standard for granting leave to appeal:
 - Interlocutory appeal is appropriate when the order appealed involves a controlling question of law as to which there is substantial ground for difference of opinion, and immediate resolution may materially advance termination of litigation.

Cobb v. Lewis (In re Lewis), 271 B.R. 877 (10th Cir. BAP 2002).

THE ELECTION PROCESS AND POSSIBLE REASONS FOR SELECTING ONE COURT OVER THE OTHER - Judge Thurman

- Appellant's election made at time NOA filed:
 - Appeal automatically goes to BAP unless a party elects to have the appeal heard by the district court by filing a timely statement of election, then the appeal goes to the district court. 28 U.S.C. § 158(b)(1).
- An election to have an appeal heard by the district court rather than the BAP is jurisdictional and BAP will review *sua sponte* whether a proper election has been made. The time for filing an election under 28 U.S.C. § 158(c)(1) is with the notice of appeal for the appellant or within thirty days from the date of service of the notice of appeal. In re King, 235 B.R. 658 (10th Cir. BAP 1999) (per curiam).
- Separate written statement required:
 - If a party desires to have the appeal heard by the district court, they must file a separate statement of election. FRBP 8001(e).
- Possible reasons for selecting the district court:
 - BAP follows its own precedent. If there is an adverse case on point, consider going to district court.
 - Related matters are already pending before district court.
- Possible reasons for selecting the BAP:
 - In depth review by three bankruptcy judges.
 - In some instances, parties know that the matter is headed for the Circuit; BAP procedures are similar (the dry-run theory).
 - The BAP was set up to hear appeals. By using the BAP, litigants are supporting that decision.

Legal Authority:

- Whether BAP decisions are binding on bankruptcy courts or district courts within their circuit is an issue that has not been addressed by the Tenth Circuit. Courts within other circuits have come to varied conclusions. See *generally*, White, P., "Precedential Effect of Bankruptcy Court, Bankruptcy Appellant [sic] Panel, or District Court Bankruptcy Case Decisions," 8 A.L.R. Fed.2d 155 (2006).
- The Tenth Circuit BAP regards the precedents established in prior BAP published opinions as binding on itself, absent changes in statute or controlling Tenth Circuit or Supreme Court precedent. *Blagg v. Miller (In re Blagg)*, 223 B.R. 795, 804 (10th Cir. BAP 1998).

MOTION PRACTICE GENERALLY - Barb Schermerhorn

- Types of motions
- Clerk authority; single judge and panel matters
- Timing; urgent motions
- Staff attorney role; e-mail circulation; process for issuing orders; live or telephonic hearing rare.
- Emergency motions: If the motion is sought to be expedited on the ground of irreparable harm, "Emergency" must precede the motion's title. FRBP 8011(d). An affidavit is required, stating the nature of the emergency and the method by which opposing counsel was notified. BAP Clerk must be given as much notice as possible of emergency motions, and motions must include FAX numbers for all parties. An appendix, consisting of the NOA, the decision appealed, and any other necessary papers, is required. BAP LR 8011-2.

MOTIONS FOR STAY - Judge Cornish

- Procedures for filing a motion - bankruptcy court, then BAP
- What should be included in papers; notice to opponent
- Filing an opposition
- What are the standards for success

- Timing: can be filed on an emergency basis

Legal Authority:

- Requests for a stay pending appeal normally should be presented first to the bankruptcy judge. FRBP 8005.
- Standard for granting stay:
 - The factors to be considered are (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will suffer irreparable injury unless the stay is granted; (3) whether granting the stay will result in substantial harm to the other parties to the appeal; and (4) the effect of granting the stay upon the public interest. *In re Lang*, aff'd, 414 F.3d 1191 (10th Cir. 2005), No. 04-4131 (10th Cir. filed Aug. 6, 2004).
- Mootness Legal Authority:
 - A case may be constitutionally moot, in that there is no remaining case or controversy, or equitably moot, in that effectual relief could be fashioned but it would be inequitable to do so. *In re Investment co. of the Southwest, Inc.*, 341 B.R. 298 (10th Cir. BAP 2006).
 - Equitable mootness determinations require consideration of five factors: (1) whether the reorganization plan has been substantially consummated, (2) whether a stay was obtained, (3) whether the requested relief would affect non-parties, (4) whether requested relief would affect success of the plan, and (5) public policy of finality. *In re Continental Airlines*, 91 F.3d 553 (3rd Cir. 1996); *In re Long Shot Drilling, Inc.*, 224 B.R. 473 (10th Cir. BAP 1998).

THE BRIEFING PROCESS - Judge Nugent

- Timing
 - When the record is complete, the bankruptcy court transmits a Certificate of Record or Readiness to Transmit Record copy to the BAP. FRBP 8007(b). Appellant's brief is due within 45 days of notice that the appeal has been docketed. BAP LR 8009-1(a)

- Extensions
 - A motion for an extension of time for filing a brief shall be made within the time limit prescribed by these rules for the filing of such brief and shall be accompanied by a proof of service.
- Form and content of briefs
 - Briefs shall be submitted in conformance with FRBP 8010 and BAP LR 8010-1.
 - Briefs must include: (1) reasons for oral argument, if requested, and (2) a statement of related cases. BAP LR 8010-1(f).
 - All parties, except the government, are also required to file a statement of interested parties. BAP LR 8018-3.
- The Record is Critical :
 - Appellants must include excerpts of the record as a separate appendix to their brief. FRBP 8009(b); BAP LR 8009-1(b)
 - Failure to provide the BAP with an adequate record for review mandates affirmance of the trial court's decision. Lopez v. Long (In re Long), 255 B.R. 241 (10th Cir. BAP 2000).

STANDARDS OF APPELLATE REVIEW - Thurman

- "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.), 220 B.R. 1005, 1012 (10th Cir. BAP 1998); Pierce v. Underwood, 487 U.S. 552, 558 (1988); Fed. R. Bankr. P. 8013; Fowler Bros. v. Young (In re Young), 91 F.3d 1367, 1370 (10th Cir. 1996).
- De novo review standard: Review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision. Salve Regina College v. Russell, 499 U.S. 225, 238 (1991).
- Clearly erroneous standard: A factual finding is "clearly erroneous" when "it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a

mistake has been made." Las Vegas Ice & Cold Storage Co. v. Far West Bank, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting LeMaire ex rel. LeMaire v. United States, 826 F.2d 949, 953 (10th Cir. 1987)). In reviewing findings of fact, BAP is compelled to give due regard to the opportunity of the bankruptcy court to judge the credibility of the witnesses. Fed. R. Bankr. P. 8013.

- Abuse of discretion standard: "Under the abuse of discretion standard[,] 'a trial court's decision will not be disturbed unless the appellate court has a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" Moothart v. Bell, 21 F.3d 1499, 1504 (10th Cir. 1994) (quoting McEwen v. City of Norman, 926 F.2d 1539, 1553-54 (10th Cir. 1991)). As with the clearly erroneous standard, when applying the abuse of discretion standard, deference is given to the bankruptcy court "because of its first-hand ability to view the witness or evidence and assess credibility and probative value." Id. (quoting McEwen, 926 F.2d at 1553-54).

THE DIFFERENCE BETWEEN A GOOD BRIEF AND A GREAT BRIEF - Judge Cornish

- What should be included in brief, how many issues to address?
- Importance of standard of review
- When to include references to the record.
- Weight given to opinions of courts outside the Tenth Circuit? Unpublished BAP decisions? Published articles?
- For the respondent's brief: Importance of addressing and distinguishing opponents' arguments and cases cited.

Legal Authority:

- The briefs must make specific references to the relevant portions of the record. Appellate court must affirm lower court when record before appellate court is insufficient to permit assessment of claims of error. Veile v. Martinson, 258 F.3d 1180, 1186 (10th Cir. 2001).
- Generally, the BAP must not consider arguments that are not raised in the trial courts. In re Black, 292 B.R. 693 (10th Cir. BAP 2003), *aff'd*, 130 Fed. Appx. 205 (10th Cir. 2005).

- In conducting a de novo review, the BAP may affirm the trial court on any basis supported by the record. *In re Strother*, 328 B.R. 818 (10th Cir. BAP 2005).

MAKING THE MOST OF ORAL ARGUMENT - Judge Nugent

- First Rule of Appellate Practice: Win in the trial court!
- Listen to the questions from the judges.
- Know the record.
- Raising new law or facts not in briefs
- Oral argument is generally helpful to the panel and should not be waived.
- Oral argument is typically limited to fifteen minutes per side. Appellants usually reserve five of their fifteen minutes for reply. Parties aligned on the same side are asked to divide their time.
- Oral argument is allowed in all cases unless the panel judges unanimously determine that oral argument is “not needed.” FRBP 8012.
- Oral argument may be conducted by telephone or video conference. BAP LR 8012-1(a).

WHAT HAPPENS AFTER ORAL ARGUMENT? - Judge Thurman

- Judges’ Procedures:
 - Post argument conference
 - Circulation of drafts
 - Final forwarded to Clerk’s Office for filing
 - Separate judgment issued
- Post argument information submission:
 - Pertinent and significant authorities that come to a party’s attention after briefing or oral argument, but before issuance of the BAP’s decision, should be filed in the form of a letter, not exceeding two

pages. BAP LR 8018-9(a). Responses filed within 5 days of service. BAP LR 8018-9(b).

- Publication of Decisions:
 - Criteria for determining whether disposition should be published: A decision should be published only if (1) the decision reviewed is published, (2) the decision establishes, modifies, clarifies, or explains a rule of law within the circuit, (3) the decision involves a legal issue of continuing public interest, (4) the decision criticizes existing law, (5) The decision contains a historical review of a legal rule and is not duplicative, or (6) the decision resolves a conflict within the circuit or creates a conflict with another circuit.
- Motions for Rehearing:
 - Motions for rehearing must be filed within ten days after entry of the judgment of the BAP. FRBP 8015. If a timely motion for rehearing has been filed, the time for appeal to the court of appeals begins to run from the entry of an order disposing of the motion for rehearing. FRAP 4(a)(4). Motions for rehearing will delay issuance of the appellate court's mandate (a certified copy of the judgment sent to the lower court) until seven days after the order is entered. FRAP 41.
- Appeals of BAP Decisions:
 - A notice of appeal to the Tenth Circuit Court of Appeals must be filed with the BAP within 30 days after the entry of a final judgment/order of the BAP. FRAP 6 [60 days if the United States, or an officer or agency thereof, is one of the parties. FRAP 4(a)(1)].
- Stay pending Appeal:
 - BAP decision automatically stayed for 10 days FRBP 8017(a).
 - BAP can stay its decision, pending appeal, upon motion and notice. FRBP 8017(b).

QUESTIONS AND ANSWERS - All